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NO. 58255-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCORMICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant violated two conditions of his suspended sentence, in revoking the suspended sentence, and in ordering appellant to serve 123 months in prison. CP 9-13. A copy of the court's order, including its findings, is attached as appendix A.

2. The state failed to prove appellant violated the condition of his suspended sentence that he not frequent an area where minors are known to congregate.

3. The state failed to prove appellant violated the community placement condition that he complete sexual deviancy treatment.

4. The trial court erred in entering findings of fact 1 and 2 and its conclusion of law in the order revoking appellant's Special Sex Offender Sentencing Alternative (SSOSA). CP 9-13; appendix A.

5. The sentence condition that appellant not frequent an area where minors are known to congregate, as defined by the supervising Community Corrections Officer (CCO), was unconstitutionally vague as applied to appellant's conduct.

6. The trial court's decision revoking appellant's suspended SSOSA sentence denied him due process.

7. Appellant was dednied effective assistance of counsel when his attorney failed to object to the denial of his due process confrontation right at the revocation hearing.

Issues Pertaining to Assignments of Error

1. Where the evidence showed that appellant went to a charity food bank[1] to obtain free food, did the state fail to prove by a preponderance of the evidence that appellant willfully violated the sentence-related condition that he not frequent areas where minors are known to assemble?

2. The court found appellant failed to complete sexual deviancy treatment when he was terminated from the program on March 21, 2006. CP 9. Where the evidence showed appellant was involuntarily terminated from treatment simply because his treatment provider heard about the state's unproved allegation that he had frequented places where minors congregated, did the state fail to prove that appellant willfully failed to complete sexual deviancy treatment?

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[1] The record alternatively identifies the food bank as associated with Saint Vincent DePaul, CP 16, or at the "Convent of Immaculate Conception Our Lady of Perpetual Help." CP 21.

3. Did the court err in its findings of fact and conclusions of law revoking appellant's suspended sentence, even though the court stated it could not find that his conduct was intentional?

4. Does a trial court violate due process when it revokes a suspended sentence and imprisons the person for 123 months without finding the person willfully violated a sentencing condition?

5. A court may only revoke a SSOSA if the offender violates the conditions of the suspended sentence or fails to make satisfactory progress in treatment. Where the state presented evidence of neither, did the court err in revoking the SSOSA?

6. The due process vagueness doctrine requires that a person must be given notice of proscribed conduct and prevents arbitrary enforcement of sentencing conditions. Did the sentencing condition here, which prohibited appellant from "frequent[ing] areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer" (CP 46), fail to give notice that appellant was prohibited from going to a charity food bank to obtain the basic necessities of life?

7. Is the due process right of confrontation denied where the state uses hearsay, including affidavits from absent, biased

witnesses, to prove that appellant did not comply with sentence-related conditions?

8. Did defense counsel properly point out that the hearsay testimony was unreliable and the witness was absent, so as to preserve the error for appeal?

9. In the alternative, where the due process error is a manifest error affecting a constitutional right, may this error be raised for the first time on appeal?

10. Was appellant's constitutional right to effective assistance of counsel violated if this Court determines counsel failed to object to the introduction of hearsay evidence where the state failed to show and the trial court failed to find good cause or hardship in producing live testimony?

B. STATEMENT OF THE CASE

On September 7, 1999, the Snohomish County prosecutor charged appellant David McCormick with first degree rape of a child. CP 55. The offense occurred February 19, 1999. CP 50, 55. The court found him guilty of first degree rape of a child following a stipulated bench trial. CP 50-51. On July 31, 2000, the court granted a SSOSA, suspending the 123-month sentence on condition that McCormick complete sexual deviancy treatment,

comply with imposed sentence-related conditions, and undergo 12 months of partial confinement at RAP house. CP 40-41. McCormick is a 61-year-old old disabled man living on disability income. CP 22; RP 13.

The conditions of McCormick's suspended sentence included, inter alia, that he have no contact with the victim, B.F.; not seek employment or volunteer positions which place him in contact with minor children; "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer"; not possess pornographic materials; not date women or form relationships with families with minor children; and participate and make progress in sexual deviancy treatment. CP 46-47.

McCormick successfully graduated from sexual deviancy treatment on April 9, 2003, and the court found him in compliance on May 7, 2003. CP 33-35. His final treatment report showed he had no unexcused absences, was financially compliant, meaningfully participated in all group sessions, and made good progress. Supp. CP ___ (sub no. 55), attached as Appendix B.[2]

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[2] That report specifically states:

After a violation hearing held June 13, 2005, McCormick was ordered to re-enroll in sexual deviancy treatment.[3] CP 28-31. Once again, his treatment provider found him to be regularly attending classes, in compliance, and making progress,[4] but involuntarily terminated him after the state moved to revoke the SSOSA. CP 14. At the revocation hearing McCormick's counsel noted his treatment provider might well be willing to take him back into the program, depending on the court's decision. Moreover, she had found a new treatment provider willing to treat McCormick, who was fully aware of the allegations. RP 6, 14.

> McCormick's compliance has been good throughout the program. He continues to assume full responsibility for his offense. His participation in-group has been excellent. . . . I see McCormick as being low risk to re-offend at this time, due to his empathy, good boundaries, compliance and awareness of high risk situations and triggers.

Supp. CP __ (sub no. 55), appendix B.

[3] The court found McCormick in violation for frequenting 3 places where minors were known to congregate: a church, park and a school. The court ordered a sanction of 120 days, ordered McCormick to re-enroll in treatment and report to his CCO within one business day of release. He complied with those conditions. CP 15-19.

[4] See, e.g., Supp. CP ___ (sub no. 64), Supp. CP ___ (sub no. 66), attached as Appendix C and D, respectively.

McCormick is disabled and lives on a fixed income. RP 13; CP 22. For years he traveled to the food bank at Saint Vincent DePaul/Immaculate Conception to obtain free food. Because of his disability, he traveled to the food bank closest to his house. RP 13. It was his understanding that his prior CCO had approved this location. Id.

However, on March 24, 2006, the state moved to revoke McCormick's SSOSA, alleging: (1) the Saint Vincent DePaul food bank was located on the property of the Immaculate Conception Grade School, McCormick's presence at the food bank constituted a willful violation of the sentence-related condition that he avoid areas where minors are known to congregate; and (2) he had failed to complete his sexual deviancy treatment when his treatment provider terminated him from treatment on March 21, 2006. RP 15; CP 15-19, 24.

McCormick denied both allegations. RP 12.

The state did not present live sworn testimony at the revocation hearing. Instead, CCO Carol Bunes addressed the court. RP 8. She also submitted an ex parte statement written by David Bralley, who was not present in court and not previously cross-examined by McCormick. CP 19. Bralley's statement

asserted he had accompanied McCormick to the food bank and McCormick had made lewd comments about children.[5] Id.

Bralley's untested assertions were contradicted by defense counsel's investigation, which included an interview with staff at the food bank. CP 21. Defense counsel observed that the food bank was a good distance away from the school:

> [i]t's really unclear that [the food bank is] affiliated with the grade school. The grade school is the next block over, and where the children congregate in the grade school is in the parking lot, the playground even further from the food bank.

RP 3. Counsel also submitted an affidavit explaining in detail the locations of the food bank, the convent, and the school. CP 20-23. According to that unrebutted affidavit, the food bank was located in the convent with its entry in an alley. The playground where parents dropped off their children was not visible from the convent. The times also were different – the food bank was not open when children were being dropped off or taken to class. CP 21-22. Counsel summed up the affidavit:

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[5] Bralley's credibility was suspect; he had been convicted of many felonies, one recently. RP 7. In its written order revoking the SSOSA sentence, the court did not expressly rely on Bralley's statement. However, it was attached to the violation report dated March 21, 2006, on which the court did rely. CP 9.

> the food bank is separate from the school and does not appear to be located in a school. A road and a large building block the playground from the sight of the food bank.

CP 22.

Counsel's investigation also showed McCormick had only gone to the food bank once a month, on the days he was entitled to go. CP 20-22; RP 5. This contradicted Bralley's claim McCormick had gone to the food bank with Bralley on multiple occasions per month. CP 19.

Ms. Bunes was unable to provide independent support for the state's case. At the hearing she instead simply relied on Bralley's claim, even asking defense counsel where buildings were located on the Church grounds. RP 11-12.

Despite the state's failure to rebut counsel's affidavit, the court revoked McCormick's SSOSA, observing: "I think it's clear there is a violation. Mr. McCormick was on the list at the food bank, and the food bank is on school property."[6] RP 15-16, CP 9-13.

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[6] This fact was disputed, and McCormick assigns error to this finding. His counsel noted that

> the playground is almost two blocks away. I mean, the place where the children congregate, it is really as far away from the food bank as it could be in terms of where it is

The court, however, did not find that McCormick *willfully* violated this condition of his suspended sentence. Instead, the court wondered:

> I don't know whether Mr. McCormick is *unwilling or simply unable* to follow the conditions and requirements set by the court and his CCO. But Mr. Baldock [deputy prosecutor] said this isn't the first time Mr. McCormick has been here for similar violations. ... There are IQ and learning disability issues here. Whether those are the issues that are precluding Mr. McCormick from following the requirements or he simply chooses not to follow the requirements, I don't know.

RP 15-16 (emphasis added).

McCormick timely appeals. CP 3-8.

C. ARGUMENT

At the time of the alleged violations, McCormick was a 61-year-old disabled man living on $450 monthly disability payments. He has limited mental capacity. Despite these hurdles, he succeeded for years in sexual deviancy treatment and was favorably discharged from treatment after completing the program.

The state nonetheless alleged he violated the conditions of his suspended sentence when he went to a charity food bank to get

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located next to the school.

RP 12. See also, CP 21-23, attached as appendix E.

free food to eat. The state's key allegations were supported only by the hearsay statement of David Bralley, who did not testify at the hearing. Nor did the court find Bralley's statement to be the kind of hearsay that is inherently reliable, or that his absence was justified by good cause. The court also failed to find McCormick willfully violated either sentencing condition.

Based on the insufficiency of the evidence, the lack of any showing or finding of willfulness, the vagueness of the condition as applied to McCormick's conduct, and the court's failure to find good cause to permit Bralley's statement without his testimony, the court erred in revoking the suspended sentence. In short, before a trial court may send someone to prison for 123 months, the state should bear a higher burden, and the court court should undertake a far more careful analysis, than the one that resulted in the revocation of McCormick's suspended sentence.

1. THE STATE DID NOT PROVE MCCORMICK VIOLATED SENTENCE CONDITIONS THAT (A) HE NOT FREQUENT AREAS WHERE MINORS ARE KNOWN TO CONGREGATE, AND (B) HE COMPLETE SEXUAL DEVIANCY TREATMENT.

The SSOSA statute in effect when McCormick's offense was committed provides that a court may only revoke a SSOSA if an offender (a) violates the conditions of the suspended sentence, or

(b) fails to make satisfactory progress in a treatment program. Former RCW 9.94A.120(8)(a)(vi) (1999).[7] Otherwise, revocation constitutes an abuse of discretion. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

At a revocation hearing, the state must prove by a preponderance of the evidence that an accused willfully violated a condition of his sentence. Joyce v. Dep't. of Corrections, 116 Wn. App. 569, 569, 75 P.3d 548 (2003), rev'd in part on other grounds, 155 Wn.2d 306, 119 P.3d 825 (2005); former RCW 9.94A.200(3)(c) (1999).[8] A revocation order should be reversed for insufficient

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[7] Former RCW 9.94A.120(8)(a)(vi) (1999) provides:

> The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The defendant violates the conditions of the suspended sentence, or (b) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

This section was recodified in 2001 as RCW 9.94A.670(10), without substantial amendment.

[8] The 1999 statute applies, as the present offense was committed in 1999. CP 55.

evidence if the court's findings are not supported by substantial evidence. Dahl, at 689-90.

a. Seeking Sustenance at a Food Bank Does Not Constitute A Willful Violation of a Prohibition on Frequenting Areas Where Minors Are Known to Congregate.

The state sought to demonstrate McCormick violated the condition that he not frequent places where minors are known to assemble when he went to the food bank. The food bank happened to be located on the property of Immaculate Conception Grade School. CP 24. However, the record is devoid of any facts from which it may be inferred that this presence was knowing or willful. See generally State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002) (in analogous circumstances, requiring that evidence sufficient to support conviction for violating a no contact order demonstrate that contact was willful, not inadvertent).[9]

[9] A person acts willfully if he or she "acts knowingly with respect to the material elements of the offense." RCW 9A.08.010(4). Knowingly is defined as "being aware of a fact, circumstance or result which is described by law as being a crime, or he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b).

McCormick freely admitted he had been going to the food bank – for years, in fact – to receive free meals. RP 3. McCormick received about $450 disability assistance per month, according to his defense counsel, and his rent was $30 less than that.[10] He needed to go to a food bank in order to eat. RP 13.

The issue was whether the state demonstrated McCormick wilfully violated the sentence condition simply by going to a food bank. Defense counsel provided an unrebutted affidavit explaining the difficulties in connecting the Saint Vincent DePaul food bank with the Immaculate Conception School. CP 20-22. The two operated at different hours. RP 3. The food bank was in the basement of the former convent. The grade school was a block away from the food bank, and the parking lot and playground – areas where minors might gather at the school – were even further away. RP 3; CP 20-23. While the convent housed some classes during the day, children were dropped off at the playground and walked over as a class shortly after 8:00 a.m., an hour before the food bank opened. CP 21. Moreover, a road and a large building

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[10] McCormick was in full financial compliance with his sexual deviancy treatment providers.

blocked the playground from being in sight of the food bank. CP 21.

CCO Bunes countered with her own survey of the area:

> [C]learly, right across the street – well, first, there is the high school, which he was violated for before, and it is one block away from the grade school. The high school is here, and then over here is the convent, which had now been turned into – because I guess there aren't any nuns, it has been turned into like the second grade. . . Underneath, in the basement, . . . is where the food bank is.

RP 11-12.[11]

McCormick's counsel interjected,

> [T]he playground is almost two blocks away. I mean, the place where the children congregate, it is really as far away from the food bank as it could be in terms of where it is located next to the school. You cannot see the playground from the food bank. The children are not dropped off there.

RP 12.

Even viewing the record in a light favorable to the state, it is insufficient to support a finding that McCormick willfully frequented an area where minors were "known to congregate." The record

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[11] It is unclear whether Bunes referred to a diagram when she addressed the court, but the record is silent as to what is referred to by "here" and "there". As such, it is nearly impossible from her statements to gauge the proximity of the grade school to the food bank. Bunes earlier explained that "the food bank is in the same building as I believe it's the second grade and the art and music classes, and they do tutoring over there." RP 8.

simply does not establish the food bank was a place where children congregated, or where they were "known to congregate."

Furthermore, no one saw McCormick in an area where children congregated. No evidence showed McCormick tried to contact children at the food bank, went there to meet them or with any awareness that they might be there, waited in line with them, or was in fact knowingly on the property of a grade school. At most, the state showed McCormick was present a block away from a grade school, obtaining the basic necessities of life from adult staff at a charity food bank.

The condition further stated he was prohibited from frequenting areas where minors are known to congregate "as defined by the supervising Community Corrections Officer." CP 46. But the state failed to establish any proof from Bunes that McCormick had been instructed not to go to the food bank. She said she had provided him a list of places to avoid, but that list did not include food banks.[12]

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[12] Bunes said, "[b]asically, because there may be some learning disabilities there, I have a long list of where those places are: Parks, schools, churches, day cares, movie theaters, shopping malls, bowling alleys, skating rinks, video arcades, Boys and Girls Club, et cetera, down the line so he clearly understood." RP 9.

In response, the state may claim that McCormick's presence at the convent, which also apparently housed some morning art classes for children, justified a finding that his conduct was willful. This claim would lack merit. First, the SSOSA condition did not prohibit McCormick from going anywhere a minor might exist: it instead prohibited him from entering places where minors are known to congregate, as defined by his CCO. CP 46. Thus, attending a food bank in the basement of a building that also houses art classes is not a violation unless the state can demonstrate that minors are known to congregate outside the class at a time while McCormick was there. RP 9. The state did not do so. The state failed to show McCormick arrived at the same time as children, or that children gathered outside the classroom.[13] Moreover, the entrance to the food bank was in the back alley, wholly separate from the entry to the classes. RP 9; CP 21.

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[13] CCO Bunes stated that "[u]nderneath, in the basement, which you go down some stairs, is where the food bank is. I had reports that McCormick was showing up there an hour, hour and a half before the food bank opened." RP 11. The only report identified in the record was unreliable hearsay statement from David Bralley. That report was contradicted by defense counsel's interview with people operating the food bank. They told her that food bank clients arrived generally 15 minutes before the food bank opened, approximately 8:45. CP 21. See argument 3, infra.

Further complicating the state's lack of proof was McCormick's low level of cognitive functioning. Although the record was replete with indications that McCormick had trouble processing information, RP 10, no evidence supported an inference McCormick wilfully violated the condition that he avoid certain venues. The court recognized this issue but failed to resolve it:

> I don't know whether Mr. McCormick is unwilling or simply unable to follow the conditions and requirements set by the court and his CCO. But Mr. Baldock said this isn't the first time Mr. McCormick has been here for similar violations. The Court has explained to him that he can't go to places where children are congregating. His community corrections officer has explained that to him. They have taken great pains to try to make that clear to him knowing he has learning disabilities. There are IQ and learning disability issues here. If those are the issues that are precluding Mr. McCormick from following the requirements or he simply chooses not to follow the requirements, I don't know.

RP 15-16 (emphasis added).

But this is precisely what the court must know in order to find a willful violation. Evidence that McCormick had admitted a violation, failed a polygraph test, or had gone to the food bank to meet children might show a willful action. However, his mere presence at a food bank, without more, is insufficient to meet the state's burden. See, State v. Bower, 64 Wn. App. 227, 231, 823

P.2d 1171, review denied, 119 Wn.2d 1011 (1992) (requiring the court to inquire into the reasons for financial noncompliance and to provide the offender with an opportunity to show that his noncompliance was not willful before revoking probation).

While the evidence might support a violation if the test were one of strict liability, that is not the test. McCormick's SSOSA was revoked simply because of his legitimate presence at a food bank that happened to be in the general vicinity of a different place where children congregate – without showing the willfulness of the violation. Because a SSOSA cannot be revoked on a theory of strict liability, the state's evidence failed to sufficiently prove its allegations. McCormick's suspended sentence should be reinstated.

b. Involuntary Suspension From Treatment Based on a Hearsay Allegation Does Not Constitute a Willful Violation.

When the treatment provider merely learned of the state's allegation, McCormick was involuntarily terminated from the treatment program. CP 14. This, in turn, led the state to move to revoke the SSOSA because McCormick was no longer in

treatment. CP 24. This violation also was not factually established, nor was it willful.

The record instead contains abundant evidence that McCormick had made and continued to make substantial progress in his sexual deviancy treatment. McCormick graduated from sexual deviancy treatment once. CP 33-35. He re-entered treatment willingly and was making progress. Appendix C, D. Moreover, as defense counsel stated at the revocation hearing, "I think [the treatment provider] would be willing to revisit the issue of having Mr. McCormick come to group, depending upon your decision here." RP 14. Furthermore, counsel's unrebutted affidavit showed McCormick had already found another treatment provider. CP 21; RP 14.

McCormick did not voluntarily stop paying, attending or participating in sexual deviancy treatment. The record instead shows one fact: the treatment provider involuntarily terminated him merely because he heard about the CCO's unproved allegations. CP 14. This simply bootstrapped one violation from a separate, unproved allegation. The record therefore does not support a finding that McCormick willfully failed to complete the treatment program.

Because the court revoked McCormick's suspended sentence despite the state's failure to prove the alleged violations by a preponderance of evidence, the decision should be reversed and McCormick's SSOSA reinstated.

c. Due Process Requires the State to Establish a Willful Violation Before Revoking a 123-month Suspended Sentence.

As discussed supra, the state failed to prove and the trial court failed to find any alleged violation was willful. CP 9; RP 15. This error violated McCormick's due process rights, because basic principles of due process require the state to prove, and the trial court to find, that a violation is willful before the court may revoke probation or a suspended sentence. U.S. Const. amend. 14; Const. art. 1, § 3; Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Smith v. Whatcom County District Court, 47 Wn.2d 98, 52 P.3d 485 (2002). Other states have held that basic principles of fairness require the state to prove a willful violation before revoking parole or a suspended sentence. See e.g., Messer v. State, 145 P.3d 457, 460 (Wyo. 2006); Van Wagner v. State, 677 So.2d 314, 316-17 (Fla. App. 1996); People

v. Zaring, 8 Cal. App. 4th 362, 10 Cal.Rptr.2d 263 (1992); State v. Williamson, 61 N.C.App. 531, 301 S.E.2d 423, 425 (1983).

To date, Washington case law appears to have only required the state to prove a willful violation when the state seeks to modify or revoke a sentence based on an offender's failure to pay financial obligations. In that circumstance, courts may punish an offender's willful recalcitrance, but not a legitimate inability to pay due to poverty. Smith, 147 Wn.2d at 111-14; State v. Woodward, 116 Wn. App. 697, 706, 67 P.3d 530 (2003); State v. Peterson, 69 Wn. App. 143, 147, 847 P.2d 538 (1993); see generally, Bearden v. Georgia, 461 U.S. at 672-73 (probation cannot be revoked for financial violations without a finding of willful noncompliance); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same).

But when the alleged violation does not involve nonpayment of financial obligations, Washington courts, interpreting Washington statutes, have permitted the state to simply prove the fact of the violation. If the violation is established, Washington cases have then allowed the burden to shift to the defense to establish the violation was not willful. Woodward, 116 Wn. App. at 703 (addressing statutory isssue but no constitutional claim); accord,

State v. Gropper, 76 Wn. App. 882, 887-88, 888 P.2d 1211 (1995); State v. Bower, 64 Wn. App. 227, 231-32, 823 P.2d 1171 (addressing financial noncompliance), rev. denied, 119 Wn.2d 1011 (1992).

These cases do not involve the length of sentence in McCormick's situation, nor do they decide this due process claim. McCormick respectfully argues that it is facially unfair and violates due process to revoke a 123-month suspended sentence without finding the person willfully violated a sentencing condition.

Due process requires the government to use standards and procedures that prevent constitutionally unacceptable risks that individuals will erroneously lose their liberty. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). Under the Mathews test, the court must balance three concepts in determining whether a state procedure violates due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 325.

Here, the private interest is freedom from bodily restraint, which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action". Foucha v. Louisiana, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780, 1785 (1992). The risk of an erroneous deprivation is unreasonably high; absent proof that a violation is willful, a person's sentence could be revoked on nothing more than a random occurrence completely unrelated to any legitimate punitive or rehabilitative objective. The state also cannot establish any significant or untoward cost for a procedure that simply requires the trial court to decide whether the person willfully violated a sentence condition.

Although Washington courts have appeared to permit the state to shift the burden to the defense when imposing sanctions for financial noncompliance, the potential 60-day sanction for those violations is far less than the 123-month sentence here. RCW 9.94A.634(3)(c). While such burden-shifting might satisfy due process where the potential loss of liberty is 60 days, Mathews requires a different balancing when a person is facing the imposition of 123-months in prison.

In essence, as trial counsel argued below, the failure to find a willful violation equates to strict liability. Where the penalty is this harsh – 123 months – its imposition without a finding of willful noncompliance violates due process. Lambert v. California, 355 U.S. 225, 228, 78 S.Ct. 240, 242, 2 L.Ed.2d 228 (1957) (confinement based on strict liability may violate due process); State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) (state must establish the offender's knowledge when proving possession of a firearm; strict liability would violate due process); State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003) (state must prove knowing possession when charging possession of an unlawful firearm; strict liability would violate due process). As the Washington Supreme Court stated in Anderson,

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Anderson, at 367 (quoting Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).

For all of these reasons, the trial court erred by revoking the SSOSA without finding a willful violation. This Court should vacate

the revocation order and remand for further proceedings in accordance with its opinion.

2. THE COMMUNITY PLACEMENT CONDITION THAT MCCORMICK AVOID AREAS WHERE MINORS CONGREGATE IS IMPERMISSIBLY VAGUE AS APPLIED TO HIS CONDUCT.

The Fourteenth Amendment and Wash. Const. art. 1, § 3 protect citizens from impermissibly vague penal statutes. State v. Baldwin, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), aff'd on other grounds, 150 Wn.2d 448 (2003). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001); see also Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("laws [must] give the person of ordinary intelligence a

reasonable opportunity to know what is prohibited so that he may act accordingly").

Conditions of a court's sentence also must not be vague. State v. Riles, 135 Wn.2d 326, 348-49, 957 P.2d 655 (1998) (holding a condition that offender not appear in areas where minors are known to congregate was not facially vague, but not addressing an "as applied" challenge); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005). A sentence condition may be unconstitutionally vague where it fails to sufficiently apprise an offender of what conduct will result in his imprisonment, or provides no assurances against arbitrary enforcement. State v. Halstien, 122 Wn.2d at 117. Even if not facially void for vagueness, a sentence-related condition is impermissibly vague if it fails to provide ascertainable standards for consistent enforcement as applied to particular conduct. State v. Stark, 66 Wn. App. 423, 432-34, 832 P.2d 109 (1992).

The Riles court held that a similar condition was not facially vague because an ordinary person would know this "restriction applies only to places where children commonly assemble or congregate." Riles, at 349. But the condition that McCormick not frequent areas where minors are known to congregate was vague as

applied to his conduct. A probationer of ordinary intelligence would not have known that he would risk imprisonment for 123 months by picking up food at a food bank. McCormick was not found to be around children; he was not at a playground; he was not at a community swimming pool, nor was he at a place listed by his CCO. Such conduct could be fairly related to the sentence condition. Instead, McCormick was attending a food bank on a monthly basis, with other indigent adults, to obtain free meals. No probationer of ordinary intelligence would have foreseen that this conduct constituted grounds for revocation of a suspended sentence.

This Court therefore should conclude the sentence condition was unconstitutionally vague as applied to McCormick's conduct. The violation order should be vacated and the case remanded with directions to strike or clarify the condition. Sansone, 127 Wn. App. at 643.

3. MCCORMICK'S DUE PROCESS RIGHTS WERE VIOLATED BY THE DENIAL OF HIS RIGHT TO CONFRONT WITNESSES.

Offenders faced with a SSOSA revocation are entitled to the same due process protections as those faced with revocation of probation or parole. U.S. Const. amend. 14; Const. art. 1, § 3; State v. Abd-Rahmaan, 154 Wn.2d 280, 285-86, 111 P.3d 1157

(2005) (citing, inter alia, Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)); State v. Dahl, 139 Wn.2d at 684. Although not provided the full panoply of constitutional rights, offenders are entitled to minimal due process, including a right to confront witnesses. Dahl, at 684 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The Washington Supreme Court has listed the rights required in a revocation proceeding:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Abd-Rahmaan, 154 Wn.2d at 286 (quoting Morrissey, 408 U.S. at 489) (Abd-Rahmaan court's emphasis).

If the state establishes a material fact through hearsay evidence, and the probationer denies the fact, due process supports the right to confrontation. Abd-Rahman, 154 Wn.2d at 290-91; Dahl, 139 Wn.2d at 686. Moreover, hearsay evidence should not be admissible at a SSOSA revocation hearing unless

the state establishes, and the court finds, "good cause" to forgo live testimony. Abd-Rahman, 154 Wn.2d at 290-91; Dahl, 139 Wn.2d at 686 (citing State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)). "Good cause" turns on the "difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." Nelson, 103 Wn.2d at 765. "When admitting hearsay on a finding of good cause, trial courts are required to articulate the basis on which they are admitting the hearsay by either oral or written findings in order to facilitate appellate review." Abd-Rahmaan, 154 Wn.2d at 291.

Abd-Rahmaan shows why reversal is required. The state alleged Abd-Rahmaan violated his community custody conditions by failing to report to his CCO on the days he was not working at the Millionaire's Club. To prove the violation, the CCO said he heard from specific Millionaire's Club staff that Abd-Rahmaan had not worked on several specific days. The CCO also had personal knowledge Abd-Rahmaan had not reported to the CCO on those days. Abd-Rahmaan, 154 Wn.2d at 283-84; see also, State v. Abd-Rahmaan, 120 Wn. App. 284, 287-88, 84 P.3d 944 (2004).

At the hearing, defense counsel asserted the CCO was presenting unreliable hearsay. The trial court overruled the

objection but failed to state reasons for admitting the hearsay, or to find good cause to justify the absence of the Millionaire's Club witness. The trial court nonetheless found the violation, based in part on the hearsay. Abd-Rahmaan, 154 Wn.2d at 283.

On appeal, Abd-Rahmaan argued the trial court violated his due process rights by relying on hearsay without a showing of good cause. The state argued an appellate court could make the necessary findings of reliability if the record provided at least some support for such findings. Abd-Rahmaan, 120 Wn. App. at 290. The state further claimed there was no need to establish the practical difficulty of procuring live testimony if the hearsay was reliable. 120 Wn. App. at 290.

This Court agreed with the state's assertions, finding the hearsay to be about a "straightforward" question: whether Abd-Rahmaan did or did not work on the days in question. The CCO's level of "detail" about the reasons for Abd-Rahmaan's firing provided additional corroboration. This Court further reasoned due process was satisfied because Abd-Rahmaan was able to give his own version and present other evidence to corroborate his version. 120 Wn. App. at 292.

Finally, this Court recognized the trial court did not find good cause to show why it would be difficult and expensive to have live witnesses, but held "it can be inferred that such difficulty exists." 120 Wn. App. at 293. Citing the Nelson court's reliance on professional reports from Western State Hospital therapists, and the Nelson court's conclusion it would be expensive and difficult to require those professionals to testify at revocation hearings, this Court reasoned that similar concerns would excuse the state from presenting live testimony to verify employment records. 120 Wn. App. at 292-93. This Court did remind trial courts to make the required good cause findings in the future, as "[t]his will help to ensure that the accused's due process rights are protected." 120 Wn. App. at 293.

A unanimous Supreme Court, however, was more receptive to Abd-Rahmaan's claim. It granted review and rejected this Court's holding and reasoning. Citing Dahl, the Supreme Court reiterated that hearsay must be demonstrably reliable and necessary, or due process is violated. Abd-Rahmaan, 154 Wn.2d at 287. The court reversed the revocation, because

> [t]here was neither a showing in the record that the hearsay evidence was demonstrably reliable nor was

> there any comment on the difficulty or cost in procuring live witnesses.

Abd-Rahmaan, 154 Wn.2d at 290. The court further criticized the process of appellate review by inference, instead stating "appellate courts require some record explaining the evidence on which the trial court relied and the reasons for the admission of the hearsay evidence." Abd-Rahmaan, 154 Wn.2d at 290.

When applied here, Abd-Rahmaan requires reversal. The hearsay claims from Bralley's subjective allegations were far less reliable than even the "straightforward" employment records in Abd-Rahmaan. Although counsel was not able to show Bralley's motives,[14] counsel did show "he has been convicted of many offenses, several felonies, one recently." RP 7. Bralley's claims also were contradicted by defense counsel's investigation, in which the food bank staff informed counsel that McCormick was only permitted to attend once per month and he arrived only 15 minutes before the food bank opened. RP 4-5. Bralley, in contrast, claimed McCormick went to the food bank every week. CP 19. In this circumstance, there was nothing demonstrably reliable about Bralley's statements. See also, Dahl, 139 Wn.2d at 687 (holding

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[14] Given Bralley's absence, this is not surprising.

statements by girls alleging Dahl had exposed himself to them were unreliable, reasoning that "without knowing any circumstances surrounding the incident and the girls' statements, the court had no information upon which to base a determination of reliability").

As in Abd-Rahmaan, the state offered no reason why it would be expensive or inconvenient to permit confrontation. This record sheds no more light on this question than the record in Abd-Rahmaan.

Because Bralley's hearsay was not demonstrably reliable, and because an appellate court cannot simply infer expense and inconvenience, there can be no finding of good cause. Reversal is therefore required. Abd-Rahmaan, 154 Wn.2d at 290-91; Dahl, 139 Wn.2d at 402-03.

There also should be no question the error is substantively prejudicial. The state used the unreliable hearsay to prove its case, where Bralley alleged he and McCormick would arrive at the food bank one and a half hours before it opened. McCormick only admitted going there shortly before the food bank opened to procure food from the food bank. Counsel's investigation provided corroborating facts showing McCormick was not there as often or as early as Bralley alleged. Bralley also alleged McCormick made

inappropriate comments toward young girls on several occasions. CP 16, 19. This was the only support for that claim. Although McCormick denied these allegations, the CCO used them as the basis for the violation notice and the trial court relied on them to revoke the SSOSA. CP 9, 16, 19. This was reversible error. Dahl, at 402-03 (where the record showed the revocation appeared to have been based in part on the use of hearsay without good cause, reversal was required).

In response, the state may claim McCormick waived this argument by failing to raise it below, State v. Nelson, 103 Wn.2d at 766-67, but such a claim would lack merit. First, counsel raised the issue, pointing out Bralley's absence several times and arguing his statements were not credible. RP 4, 7. The state provided no cause, and the court certainly did not find good cause, to justify Bralley's absence. Under Abd-Rahmaan, at 290-91, the trial court must make those findings.

Second, State v. Nelson is distinguishable. Nelson, 103 Wn. 2d at 767. There, the court found medical reports from doctors and treatment providers at Western State Hospital demonstrably reliable in establishing Nelson's lack of amenability to treatment. Id. The Nelson court also found good cause to avoid the expense and

inconvenience of requiring those professional witnesses to provide live testimony. Furthermore, in the trial court, defense counsel himself argued hearsay from the therapists' notes should be considered by the court. Nelson, 103 Wn.2d at 766.

Not surprisingly, the Nelson court did not allow the defense to change position on appeal and argue the trial court could not rely on the professional hearsay without violating Nelson's due process rights. Nelson, 103 Wn.2d at 766-67. The court took care to note, however, that a "simple . . . notification, objection, or motion" would be sufficient to preserve the issue for appellate review. Id., at 766.

Unlike Nelson's counsel, McCormick's attorney amply notified the court of Bralley's absence and opposed the state's reliance on Bralley's hearsay. Unlike the professional reports in Nelson, Bralley's hearsay statement also had no demonstrable reliability, but instead was contradicted by counsel's investigation. Nelson therefore cannot support a claim the due process violation was waived.

Because the error was substantively prejudicial, the proper remedy is to vacate the invalid revocation order and remand for a new hearing. Abd-Rahmaan, 154 Wn.2d at 291; Dahl, 139 Wn.2d at 689.

4. ALTERNATIVELY, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO THE USE OF UNRELIABLE HEARSAY TO REVOKE MCCORMICK'S SSOSA.

To the extent a waiver claim might have arguable merit, this Court should hold that McCormick was denied effective assistance of counsel. Counsel provides constitutionally ineffective assistance if counsel's objectively deficient performance prejudices the client. Prejudice is defined as "a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Where a claim of ineffective assistance is based on counsel's failure to challenge the admission of evidence, an appellant must show (1) an absence of legitimate strategic reasons supporting the conduct; (2) an objection would likely have been sustained, and (3) a reasonable probability the result would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) (finding counsel ineffective for eliciting client's prior criminal conviction on direct examination).

Here, if counsel failed to sufficiently object to the court's use of Bralley's statement, that failure cannot be considered a legitimate tactic. There could be no strategic gain from this oversight, especially as counsel repeatedly drew the court's attention to the fact that Bralley was not present in court. RP 4, 7.

The objection would likely have been well taken. Washington case law establishes McCormick's due process right of confrontation, and further that hearsay was inadmissible in the absence of a finding of good cause. Abd-Rahman, 154 Wn.2d at 290-91. Here, Bralley's statement was unreliable, and there was no finding that it would have been difficult for the state to produce him in person to be cross-examined.

Moreover, the failure prejudiced McCormick. The court relied on Bralley's statement, although it was not specifically mentioned in the written findings.[15] CP 9. The Court stated,

> Though [the food bank] may not be located in the main school, there are children that take classes at the school and who are present at the time that Mr. McCormick is there in coming and going apparently. Even though they may not be dropped off there, they have to get there in some way.

---

[15] The court's order explicitly relies on the notice of violation report. Bralley's affidavit is submitted as an appendix thereto. CP 19.

RP 15.

The only suggestion that McCormick arrived at the same time as school children was from Bralley's statement. CP 19. CCO Bunes relied heavily on this hearsay report in expressing her concerns to the court. RP 11. McCormick told Bunes he arrived much later the food bank, and this was consistent with what the staff at the food bank told his attorney. CP 21. Thus, there is a reasonable probability that, but for counsel's error in failing to preclude the introduction of hearsay, or counsel's failure to demand to cross-examine Bralley, the court would not have revoked McCormick's SSOSA.

To the extent it could be argued counsel did not adequately object, that deficient performance rendered the outcome sufficiently unreliable and prejudiced McCormick's case. The proper remedy is reversal and remand.

D. CONCLUSION

For the reasons above, this Court should reverse the revocation of McCormick's SSOSA, and reinstate his suspended sentence.

DATED this 22d day of December, 2006.

Respectfully submitted,

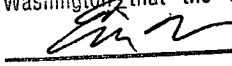
NIELSEN, BROMAN & KOCH, PLLC

ERIC BROMAN
WSBA 18487
Office ID No. 91051
Attorney for Appellant

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/~~appellant/plaintiff containing a copy of the document to which this declaration is attached.

Snohomish

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, WA 12/22/06 Date

APPENDIX A

No. 58255-1-I

CL11504143

FILED
06 MAY 17 AM 11:23
PAM L. DANIEL
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

MCCORMICK, DAVID ELVIN

Defendant.

No. 99-1-01667-4

ORDER MODIFYING SSOSA SENTENCE/REVOKING SSOSA SENTENCE/ORDER OF CONFINEMENT/WARRANT OF COMMITMENT

1.1 The court received a petition for an order modifying sentence, revoking sentence alternative, and imposing confinement for the above defendant.

1.2 This matter was heard on the 16TH day of ~~March~~ MAY, 2006, and the court having considered a violation report dated **March 21, 2006** and/or :

[X] Affidavit(s) from: CHRIST INC SALVERS

[X] Testimony of CLAIRE BURES CCO

[ ] The defendant's stipulation to the violation of the requirements or conditions of sentence alleged in the petition as violation(s) number(s) _____

[ ] Other: _____

and the argument of counsel;

II. FINDINGS

2.1 The defendant has

[X] violated the conditions of the suspended sentence, to wit:

1. **Frequenting a place where minors are known to congregate by visiting the food bank located on Immaculate Conception Grade School property on March 3, 2006.**
2. **Failing to complete a sexual deviancy treatment program by being terminated unsuccessfully on March 21, 2006.**

~~[X]~~ failed to make satisfactory progress in treatment.

AB

[ ] The defendant shall not consume any alcohol.
[X] Defendant shall have no contact with: B.F. (DOB 4/03/87)
[X] Defendant shall have no contact with minor children.
[ ] Defendant shall remain [ ] within [ ] outside of a specific geographical boundary, to wit: _____

_____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

_____

_____

[ ] The defendant shall undergo an evaluation for treatment for

[ ] domestic violence

[ ] substance abuse

[ ] mental health

[ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

AS ORDERED IN APPENDIX B TO ORIGINAL JUDGMENT + SENTENCE

_____

[ ] **Community Supervision** (when confinement imposed is 12 months or less, and crime was committed before 06/06/96). Defendant shall serve _____ months (up to 24 months) in community supervision. Defendant shall report to the Department of Corrections, 8625 Evergreen Way, Suite 100, Everett, Washington 98204, not later than 72 hours after release from custody and the defendant shall comply with the instructions, rules and regulations of the Department for the conduct of the defendant during the period of community supervision, including reporting as directed to a community corrections officer, notifying the community corrections officer of any change in the defendant's address or employment, paying as directed the supervision fee assessment and other special service fees, remaining within prescribed geographic boundaries, and shall obey all laws. In addition, the defendant shall comply with the following crime-related prohibitions:

[ ] Defendant shall not possess or consume any alcohol or any controlled substances, unless legally prescribed.

[ ] Defendant shall have no contact with minor children.

[ ] _____

_____

_____

[ ] Defendant to appear at a review hearing on this date _____ at 8:30 AM, Room #201.

[ ] Defendant shall pay $_____ by _____.

[ ] Defendant shall pay [ ] $50 [ ] $_____ each month on Legal Financial Obligations in this cause commencing on _____.

III. ORDER

IT IS ORDERED that:

3.1

[ ] The sentence previously entered in the above entitled matter, including any previous modifications, is still in effect but MODIFIED in the following manner:

_____

_____

_____

_____

_____

[ ] Confinement is IMPOSED. The defendant shall serve _____ days of (total) (partial) confinement in the _____ County Jail.

[ ] The remaining term of _____ days of partial confinement is converted to total confinement.

[ ] Credit is given for (time) (_____ days) served.

3.2

[X] The special sexual offender alternative sentence is VACATED. The order suspending the execution of the sentence previously issued is REVOKED and SENTENCE EXECUTED.

[X] Confinement is imposed. The defendant shall serve 123 months of:

[ ] total confinement in the custody of the Department of Corrections.

[ ] (total) (partial) confinement in the custody of the _____ County Jail.

[X] Credit is given for (time) (_____ days) served.

[ ] **COMMUNITY PLACEMENT [For Determinate Sentences]** is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months.

[X] **COMMUNITY CUSTODY RANGE [For Determinate Sentences]** is ordered as follows:

Count I for a range from 36 to 36 months;

Count _____ for a range from _____ to _____ months;

Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses – serious violent offense, second degree assault, any crime against a person with a deadly weapon finding. Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense – RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] Defendant shall report to the Snohomish County Clerk's Office and set up a payment plan immediately, or in custody, within 24 hours of release from custody.

BAIL MONIES:

[ ] The clerk is ordered to apply bail posted on _____ in the amount of _____ to defendant's legal financial obligations.

[ ] Bail posted on _____ in the amount of _____ is hereby exonerated. The clerk is ordered to release monies posted for an appearance bond or cash bail to the appropriate person or persons.

[ ] The court finds the restitution order in this cause to have been untimely filed and, therefore, void. This order is prospective from today and does not affect any amounts previously paid.

DONE IN OPEN COURT this 16TH day of ~~March~~ May, 2006.

HON. THOMAS J. WYNNE, JUDGE

Presented by:

MATTHEW D. BALDOCK, #30892
Deputy Prosecuting Attorney

Copy received by:

Defendant's Attorney, #27690

DAVID ELVIN MCCORMICK, Defendant

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the county of Snohomish, state of Washington, and to the Secretary of the Department of Correction, and the Superintendent of the Washington Corrections Center of the state of Washington, GREETINGS:

WHEREAS DAVID ELVIN MCCORMICK has been duly convicted of the crime of Rape of a Child in the First Degree as charged in the Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him that he be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term of 123 months, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof, Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presents shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable THOMAS J. WYNNE, Judge of the said Superior Court and the seal thereof, this 17 day of ~~March~~ MAY, 2006.

CLERK OF THE SUPERIOR COURT

By: _____
Deputy Clerk

APPENDIX B

No. 58255-1-I

99-1-01667-4 56

SAFE-T

SEXUAL ABUSERS FAMILY EMPOWERMENT TREATMENT

JUDITH E. McALLISTER, MSW, COORDINATOR
TED MAUSSHARDT, M.A., AFFILIATE
2722 Colby, Suite 402
Everett, WA 98201

SUPPLEMENT TO FINAL TREATMENT REPORT

Name: David E. McCormick
ADDRESS: 2308 Grand Avenue, Apt. G9, Everett, WA 98201
DOB: 5-23-45
AGE: 58
DATE TREATMENT BEGAN: August 6, 2001
COUNTY OF JURISDICTION: Snohomish
COURT CAUSE NUMBER: 99-1-01667-4
REPORTING PERIOD: March 20 to April 23, 2003
REPORT DATE: April 24, 2003

FILED
2003 MAY -5 PM 12:00
PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

BACKGROUND INFORMATION:
Treatment termination date: April 9, 2003
Criminal charge: Rape of a Child I
Length of suspended sentence: 123 months

DATES OF SERVICE:
Individual therapy: None since March 20, 2003

Group therapy: April 4, 9 and 23, 2003

Other therapy: None

Absences/reason: Mr. McCormick was absent from group on March 26 and April 16, 2003 due to illness. These absences were excused in advance. He has attended all other scheduled group sessions.

CURRENT LIVING SITUATION, WORK, SIGNIFICANT SOCIAL RELATIONSHIPS:
Mr. McCormick is still living in the same Clean and Sober house, but is looking for another place to live. He cannot work because of health problems. He does not appear to be socially isolated. He does a good job of keeping himself occupied with positive activities and relationships. There are no indications of significant depression. He consistently maintains a very positive attitude about life.

TREATMENT STATUS/PROGRESS:
Mr. McCormick has now completed treatment. He graduated from the program on April 9, 2003. He continues to attend group and is an asset in discussions.

VICTIM CONTACT ISSUES:
There are no concerns regarding victim contacts.

VIOLATION OF TREATMENT PROGRAM RULES OR COURT ORDER:

A compliance polygraph was administered on April 7, 2003 and Mr. McCormick was deemed non-deceptive. There have been no indications of non-compliance during this report period.

BRIEF RISK ASSESSMENT:

I see Mr. McCormick as being at low risk to reoffend at this time, due to his empathy, good boundaries, compliance, and awareness of high risk situations and triggers.

OVERALL PROGRESS:

Mr. McCormick has done a good job of correcting his thinking, developing empathy and proper boundaries and gaining self-control while in the program. I expect him to be able to successfully maintain himself in the community from this point on.

TREATMENT PLAN UPDATE:

Mr. McCormick graduated from the treatment program on April 9, 2003. He will continue to attend group on a voluntary basis at least twice a month for three more months.

Judith E. McAllister
Certified Sex Offender Treatment Provider

cc: Judge Wynne, Prosecutor, Sherry King, Dan Crocker, Dept. of Corrections

APPENDIX C

No. 58255-1-I

99-1-01667-4 64

Pw File

SAFE-T
SEXUAL ABUSERS FAMILY EMPOWERMENT TREATMENT
JUDITH E. McALLISTER, MSW, CSOTP
2722 Colby, Suite 402
Everett, WA 98201

QUARTERLY TREATMENT PROGRESS REPORT

Name: David E. McCormick
ADDRESS: 2308 Grand Avenue, Apt. G8, Everett, WA 98201
DOB: 5-23-45
AGE: 58
DATE TREATMENT BEGAN AGAIN: July 9, 2003
COUNTY OF JURISDICTION: Snohomish
COURT CAUSE NUMBER: 99-1-01667-4
REPORTING PERIOD: February 2 to May 12, 2004
REPORT DATE: May 17, 2004

BACKGROUND INFORMATION:
Treatment termination date: Undetermined
Criminal charge: Rape of a Child I
Length of suspended sentence: 123 months

DATES OF SERVICE:
Individual therapy: February 4 and 18, 2004
March 10 and 24, 2004
April 7 and 21, 2004
May 5, 2004

Group therapy: February 4 and 25, 2004
March 3, 10, 17, 24 and 31, 2004
April 7, 21 and 28, 2004
May 5 and 12, 2004

Other therapy: None

Absences/reason: Mr. McCormick was absent from group on February 11 and 18, 2004 and April 15, 2004 due to illness. These absences were excused. He has attended all other scheduled group and individual sessions. Mr. McCormick has been dealing with severe health problems related to his diabetes this quarter. In addition, he fell on April 13 and hit his head. The doctor told him it was due to the nerve damage in his legs.

CURRENT LIVING SITUATION, WORK, SIGNIFICANT SOCIAL RELATIONSHIPS:

Mr. McCormick is still living in the same Clean and Sober house. Although he is unable to work due to his health, he keeps himself busy with fishing, craft projects and managing the house he lives in. He does not appear to be socially isolated, nor are there indications of significant depression.

TREATMENT STATUS/PROGRESS:

Mr. McCormick has made good progress since returning to treatment. He has been working on correcting cognitive distortions, assertiveness, handling his anger, and communication skills. He has completed all of the work he needs to

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do regarding the two additional offenses which were disclosed last summer. His level of empathy is good. He needs to be more careful about his boundaries around children. His participation in the group has been good and he is appropriately self-disclosing and models openness for other group members. His attendance has been acceptable, given his health problems. On May 12 he was observed by a passing CCO to be interacting briefly with 2 adolescents at a bus stop, demonstrating that he is not taking his restrictions seriously enough. The girls apparently waved at him from a distance to let him know to flag down the bus for them. He did so and when they approached and said "Thank you," he told them "You're welcome." He maintains that he did not know they were minors until they came closer. His treatment group pointed out that he shouldn't be interacting with people unless he is positive they aren't minors. He was polygraphed the same day and the results are summarized below. It appears that I will need to transfer him to another therapist at the end of June when I am ready to retire. He is exploring who he will see at that time. His CCO has also enrolled him in the MRT class, as a consequence of his violation.

VICTIM CONTACT ISSUES:

Mr. McCormick has not had any contact with his three victims. No new offenses have been disclosed. The only reported accidental contact with minors is described above.

VIOLATION OF TREATMENT PROGRAM RULES OR COURT ORDER:

The most recent polygraph was done on May 12, 2004 and no deception was indicated. Mr. McCormick described the incidental contact as outlined above. The relevant questions were:

1. Have you lied to me about viewing any pornography since December 19, 2003?
2. Other than what you now report, have you lied to me about having contact with minors since December 19, 2003.
3. Have you lied to me about drinking any alcohol since December 19, 2003?

No other accidental contacts with minors were disclosed and no other violations of his treatment, probation or court requirements were disclosed on the polygraph. It appears that Mr. McCormick has become somewhat lax in his avoidance of contacts with minors. In other respects he seems to be compliant.

BRIEF RISK ASSESSMENT:

I believe Mr. McCormick is still at low risk to reoffend, but the recent lapse raises some concerns regarding compliance.

OVERALL PROGRESS:

Mr. McCormick's attitude and progress have been good this quarter, with the exception of the contact with minors at the bus stop.

TREATMENT PLAN UPDATE:

I am recommending that Mr. McCormick be transferred to a new treatment provider at the end of June, 2004.

Judith E McAllister
Certified Sex Offender Treatment Provider
cc: Judge Wynne, Prosecutor, Sherry King, Dan Crocker, Claire Bunnes

APPENDIX D

No. 58255-1-I

S[illegible]-KING COUNSELING SERVICES
Johnson Bldg, Suite 105
4215 198th Street SW
Lynnwood, WA 98036
Tel: (425) 744-0300 Fax: (425) 775-8045

Norman G. Nelson, M.C. **Stan Woody, M.S.**

Pw File

October 7, 2004

Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller, MS 502
Everett, WA 98201

FILED
04 OCT 13 AM 10:16
PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

RE: **David E. McCormick**
CASE: **99-1-01667-4**

Enclosed is a copy of the monthly report I sent to Mr. MCCormick's Community Corrections Officer. On September 2, 2004 Mr. McCormick enrolled in this agencey's sexual deviancy treatment program. A copy is also being sent to the Prosecutor.

If I can provide further information or clarification please contact me at (425) 744-0300.

Warm Regards,

Norman G. Nelson, M.C.
Licensed Mental Health counselor
Sex offender Treatment Provider

99-1-01667-4 66

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/O-KING COUNSELING, LL
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NORMAN G. NELSON, M.C. STAN WOODY, M.S.

October 7, 2004

Claire Bunes, CCO-III
DOC
8625 Evergreen Way, Ste. 100
Everett, WA 98208

CONFIDENTIAL

MONTHLY PROGRESS REPORT: SEX OFFENDER TREATMENT

RE: **David E. McCormick**
CASE: **DOC # 806545**

Crime: Rape of a Child, First Degree
Date Treatment Started: Sept. 21, 2004
Anticipated Date of Completion: To be Determined

Compliance/Non-Compliance: Mr. McCormick is in compliance.

Sessions attended: Individual…September 2 and 10, 2004.
Groups… September 21, and 28, 2004.
Sessions missed: September 14, called in sick saying he had the flu.

Summary of treatment focus this period:
Two individual sessions for initial intake, contract and forms signatures, and orientation to rules and expectations.

Mr. McCormick's intake assessment determined that he would benefit most from this agency's Tuesday evening group of seven members, all of whom have either a social or cognitive delay or deficits. This group is less intense, less intellectually demanding, with emphasis on CASE—creating a safe environment.

Mr. McCormick demonstrated past experience in group work, and on the first evening was commenting and making suggestions with others. He introduced himself, admitted to his crimes (of record) but glossed over recent PV by saying, "they thought I was having contact with children, but I was just waving down a bus."

Progress: Integrating well into the group. Others are accepting him.

Changes in Employment/Residence/Relationships/Other:
Living in a clean and sober house, on an income from SSI. Slated for carpal tunnel surgery on Oct. 6, 2004.

Counselor's Observations, Impressions, or Comments
Appears to be acclimating well.

Risk Assessment Status: Treatment involvement reduces Mr. McCormick's risk some.

Treatment Provider's Recommendations: Continue Treatment

10/7/04

Norman G. Nelson, M.C., LMHC, SOTP, CDVC

APPENDIX E

No. 58255-1-I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON Plaintiff, vs. DAVID MCCORMICK, Defendant.	NO. 99-1-01667-4 DEFENSE MEMORANDUM RE: PROBATION VIOLATION HEARING

COMES NOW the defendant by and through his attorney, Christine Sanders, of the Snohomish County Public Defender Association, and responds to the violations alleged by DOC that Mr. McCormick: (1) Frequented a place where minors are known to congregate by visiting the food bank located on Immaculate Conception Grade School property on 3/03/06. (2) Failed to complete a sexual deviancy treatment program by being terminated unsuccessfully on 3/21/06.

AFFIDAVIT

I am the attorney of record in this case and make the following affidavit based on information and belief regarding probation allegations alleged by CCO, Claire Bunes:

1. Defense counsel visited the food bank run by St. Vincent De Paul alleged to be located on the premises of Immaculate Conception Grade School on a school day, April 7, 2006. This food bank is located in the Convent of Immaculate Conception Our Lady of

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Perpetual Help at 2430 Hoyt Avenue.

2. Immaculate Conception Our Lady of Perpetual Help Grade School is located one block away from the convent at 2508 Hoyt Avenue in Everett.
3. On April 7, 2006, Fran and her husband Lloyd were working at the food bank located at Immaculate Conception Convent. The hours for the food bank are on Fridays from 9:00 a.m. to 10:20 a.m.
4. Fran and Lloyd spoke with counsel about David McCormick. They remember him well. Fran stated that David had been coming there for some time. David came in February and March of this year.
5. During that period, David only came once a month—the current limit for individuals to visit this food bank. Several months ago, the local grocers stopped providing this food bank with fresh produce, consequently the schedule was changed allowing individuals to come once a month instead of once a week.
6. Defense counsel asked Fran whether people ever arrived early to the food bank. She stated that typically, individuals would come 15 minutes earlier than the time the food bank opened, or approximately 8:45. She also stated that David McCormick would be welcome to return if he were released from custody.
7. On May 10, 2006, Christine Sanders and Jennifer McIntyre visited the Immaculate Conception Our Lady of Perpetual Help Grade School. We spoke with Kristine Rohlinger in administration. She informed us that school starts at 8:00 a.m. Parents drop their children off at the playground at 7:50 a.m. The playground is located South of the school. The playground is not visible from the Convent, where the food bank is located. The convent is one block north of the school.
8. The convent does house some classes during the day, but children are not dropped off at the convent, they are dropped off at the playground located at the school and walked over as a class with their teachers shortly after 8:00 a.m.
9. The entrance to the food bank is located off an alley and small parking lot. Children are not dropped off in this alley and the entrance to the convent where children enter is not located on the side of the building where the food bank located.
10. David McCormick told CCO Claire Bunes that he arrived at the food bank on March 3,

2006, at approximately 8:30 to 8:45. This is consistent with what the food bank workers told defense counsel.

11. David McCormick will tell this court that he has been going to this food bank for several years, and that he believes his prior CCO knew of this and that it was not a problem.
12. The food bank is separate from the school and does not appear to be located in a school. A road and a large building block the playground from the sight of the food bank.
13. David Bralley has written a statement to Claire Bunes regarding Mr. McCormick. Defense counsel researched David R. Bralley on SCOMIS and found that Mr. Bralley has an extensive criminal record including a drug manufacturing from 2005, two separate criminal possessions of rented/ leased property, theft and assault charges.
14. Defense counsel has spoken to a sex offender treatment provider, Rachelle Cowan. Mr. McCormick authorized our office to send Ms. Cowan all of the discovery as well as the probation violation summaries from the previous several years. Ms. Cowan has agreed to treat Mr. McCormick should he be released from jail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Everett, Washington, this 10th day of May, 2006.

CHRISTINE SANDERS, WSBA 24680
Attorney for Defendant

VIOLATION 1- Food Bank

Mr. McCormick has been going to the food bank for several years. Earlier, when this particular food bank offered fresh produce, Mr. McCormick would go once a week. Several months ago, local grocers stopped supplying the food bank with fresh produce. From that point on, individuals were only entitled to go to the food bank once a month.

Based on the location of the food bank as well as the limited hours it is in operation, it is not clear that this food bank is located at a grade school.

The only evidence this court has in front of it regarding the specific time that Mr. McCormick went to the food bank on March 3, 2006, is from David Bralley. Mr. Bralley is not

credible. Mr. McCormick denies making comments to Mr. Bralley that Mr. Bralley attributes to him. We know that Mr. Bralley is wrong about the amount of times he and Mr. McCormick were going to the food bank this year. The food bank was clear that Mr. McCormick, and any other individual using it, came only once a month this year and specifically one time respectively in February and March. Even if one went early to the food bank, one would not see children while waiting in the parking lot of the food bank. Children are not dropped off at the food bank. The parking lot where children are dropped off is not visible from the parking lot of the food bank.

On March 3, 2006, Mr. McCormick went to this food bank as he did once a month most months, arriving 15 minutes early, at 8:45. Mr. McCormick did not commit a violation by picking up groceries on March 3, 2006, from a food bank that is located close to his house. Mr. McCormick is physically disabled, getting around is a chore for him and very difficult. By all accounts, Mr. McCormick does not leave his apartment very often and has no means of financial support other than limited social security. In addition to rent, utilities, food and other expenses Mr. McCormick also must pay for treatment.

Mr. McCormick denies this violation.

II. VIOLATION 2—Termination from treatment

Norm Nelson terminated Mr. McCormick from treatment based on the alleged violation mentioned above and the fact that Mr. McCormick was in jail. Mr. McCormick has no control over being in custody and he denies the above violation. Should this Court release Mr. McCormick, he intends to continue sexual deviancy treatment.

Mr. McCormick has found another treatment provider, Rachelle Cowan, of Fountaingate. Mr. McCormick denies this violation.

DATED this 10th day of May, 2006.

Respectfully Submitted,

CHRISTINE SANDERS, WSBA #24680

SNOHOMISH COUNTY PUBLIC DEFENDERS
1721 HEWITT AVENUE - SUITE 200
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